CCDLA
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March 24, 2014

Hon. Eric D. Coleman, Co-Chair
Hon. Gerald M. Fox, Co-Chair
Joint Committee on Judiciary
Room 2500, Legislative Office Building
Hartford, CT 06106

Re: Raised Bill 488

Dear Chairmen Coleman and Fox:

CCDLA is a not-for-profit organization of more than three hundred lawyers who are dedicated to defending persons accused of criminal offenses. Founded in 1988, CCDLA is the only statewide criminal defense lawyers' organization in Connecticut. An affiliate of the National Association of Criminal Defense Lawyers, CCDLA works to improve the criminal justice system by insuring that the individual rights guaranteed by the Connecticut and United States constitutions are applied fairly and equally and that those rights are not diminished.

CCDLA opposes Raised Bill 488, An Act Concerning Grand Jury Reform. It appears that the Division of Criminal Justice has submitted substitute language that cuts back on some of the proposed changes in the originally submitted RB 488. This testimony will address the originally submitted RB 488 and the substitute language.

As the Office of the Chief Public Defender states in its testimony, CCDLA has engaged in discussions with Honorable Elliot Solomon, Honorable Maria Kahn, Deputy Chief Public Defender Brian Carlow, Chief State's Attorney Kevin Kane, and Alan Sobol as representative of

the Criminal Justice Section of the Connecticut Bar Association regarding the issue of grand jury reform. While CCDLA was and is willing to discuss and consider changes to the current grand jury statutory scheme, the very basic question of why the scheme needs to be changed, or in the case of RB 488, completely overhauled, has yet to be answered. Proponents of change have not demonstrated why grand jury reform is necessary; there has been no showing that the current scheme results in the rejection of an inordinate number of grand jury applications. Before the current grand jury scheme should be reformed, proponents of such change must be required to demonstrate an objective, proven problem with the current scheme.

The originally proposed changes in RB 488 are more extensive than the proposed changes in the substitute language received from the Chief's States Attorney's Office on Friday, March 21. Testimony relevant exclusively to the originally submitted RB 488 is set forth in bold typeface, while testimony relevant to the narrowed down language of RB 488 as contained in the substitute submission is set forth in regular typeface.

The current proposal guts the entire investigatory grand jury process and procedure as it exists in Connecticut and replaces it with a process that is controlled by the state's attorney's office with scant oversight by **no more than two judges at each stage of the proceeding. At the initial phase, it is the presiding criminal judge in the judicial district where the crime is alleged to have occurred who approves the application for the investigatory grand jury – which typically will be made by a state's attorney who appears before that judge regularly, and then the "investigatory grand jury" is a judge from that same judicial district, appointed by the presiding judge. Under the current system, the panel of judges who approves the application is not required to work directly with the applicant or the grand juror(s), the proposed bill requires as much and the purpose behind it is transparent, to**

give the prosecutor as much control as possible with as little oversight from the grand jury as possible.

In order to understand just how significantly 488 changes the present grand jury procedure, it is important to understand how the grand jury process currently works.

Who makes the application for the grand jury and what kind of crimes does the grand jury investigate?

Under the current state of the law, any judge of the Superior, Appellate, or the Supreme Court, the chief state's attorney, or a state's attorney may apply to a panel of judges for an investigation into the commission of a crime or crimes. C.G.S. 54-47b(1). Moreover, the crimes subject to grand jury investigation are limited to "(A) any crime or crimes involving corruption in the executive, legislative or judicial branch of state government or in the government of any political subdivision of the state, (B) fraud by a vendor of goods or services in the medical assistance program under Title XIX of the Social Security Act Amendments of 1965, as amended, (C) any violation of chapter 949c, (D) any violation of the election laws of the state, (E) any felony involving the unlawful use or threatened use of physical force or violence committed with the intent to intimidate or coerce the civilian population or a unit of government, and (F) any other class A, B or C felony or any unclassified felony punishable by a term of imprisonment in excess of five years for which the Chief State's Attorney or state's attorney demonstrates that he or she has no other means of obtaining sufficient information as to whether a crime has been committed or the identity of the person or persons who may have committed a crime." C.G.S. § 54-47b(2).

Raised bill 488, section 1, would do away with 54-47b(1) almost entirely by enabling only the chief state's attorney or a state's attorney to make the application for an investigatory

grand jury. Additionally, RB 488, section 1 would do away with the requirement that the state's attorney demonstrate that there is no other means of obtaining sufficient information as to whether a crime has been committed or the identity of the person who committed it. It only requires that the state's attorney show that "the interests of justice require the use of an investigatory grand jury." The bill essentially substitutes a standard that has been deemed fair and appropriate for years, with no meaningful standard whatsoever.

The amendment will enable prosecutors to apply for an investigatory grand jury in almost any instance where any felony punishable by more than five years of incarceration, may have occurred and needs to be investigated. The prosecutor will not be required to go through the usual course of investigation – police interviewing witnesses, obtaining search and seizure warrants, etc. before the prosecutor can proceed directly to a grand jury investigation where witnesses are compelled to testify and produce documents and tangible evidence.

What must the applicant demonstrate to secure an investigatory grand jury?

Under the current state of the law, the applicant must have a reasonable belief that the administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime has been committed. In addition, he must include in his application a statement of the facts and circumstances that justify this belief. If the applicant is the chief state's attorney or a state's attorney, the application must include:

1. The status of the investigation and of the evidence collected by the application date;

2. an explanation of why other normal investigative procedures that were tried failed or why normal procedures are unlikely to succeed or are too dangerous to use; and

3. reasons for the applicant's belief that an investigatory grand jury and the investigative procedures it employs will lead to a finding of probable cause that a crime was committed. C.G.S. 54-47c(c).

Raised bill 488, section 2 removes any articulable standard for approval of the application. It deletes the requirement that the chief states attorney or state's attorney have a reasonable belief that the administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime has been committed, and it eliminates the requirement that the applicant demonstrate 1-3 articulated above.

Historically, dating back prior to 1971, the state's attorney has been required to show that his usual investigative tools were ineffective. Inexplicably, 488 removes that requirement. Instead, the chief state's attorney or state's attorney has to demonstrate only that he has a "reasonable belief that the interests of justice require the use of an investigatory grand jury, including the reasons why the ability to compel the attendance of witnesses and the production of documents and other tangible evidence will substantially aid the investigation." This watered down standard means that the prosecutor does not have to make an attempt to interview witnesses through the normal investigative channels first or obtain a search and seizure warrant based on probable cause for documents or tangible evidence, but can decide to immediately pursue an investigatory grand jury because it will perhaps be faster and easier. The proposed bill makes a mockery of the fourth and fifth amendments by doing away with protections and standards presently required under existing law.

Who comprises the panel that approves the application for an investigatory grand jury and what must they find in order to grant the application?

Under the current law, the panel considering grand jury applications is made up of a panel of three Superior Court judges who are designated by the Chief Justice to review applications. One of the three may be the Chief Court Administrator. The panel reviewing an application may approve it and order an investigation if it finds that:

1. The administration of justice requires an investigation to determine if there is probable cause to believe that a crime was committed;

2. if the applicant is a prosecutor, that other normal investigative procedures have failed, reasonably appear to be likely to fail, or appear too dangerous to try; and

3. the investigative procedures that an investigative grand jury uses appear likely to succeed in determining if there is probable cause to believe that a crime was committed. C.G.S. 54-47c(d).

Under the substitute language submitted and pursuant to RB 488, section 2, the panel need only find that the interests of justice require the use of an investigatory grand jury, and that allowing the applicant to compel the attendance of witnesses and the production of documents and other tangible evidence will substantially aid the investigation. As stated in the previous section, this watered down standard compromises fourth and fifth amendment protections because it does not require law enforcement to attempt normal investigative procedures first (that are subject to constitutional limitations), such as seeking voluntary interviews with witnesses and obtaining search and seizure warrants for documents or tangible evidence based on probable cause before applying for a grand jury investigation. Instead, 488 enables a state's attorney or

the chief state's attorney to immediately pursue an investigatory grand jury because it will be faster and easier.

In addition to diluting the standard required for granting the application, Raised Bill 488, section 1 also does away with the three judge panel. Ironically, in 1985 when the investigative grand jury law was substantially amended, then Chief State's Attorney Austin McGuigan testified before the Judiciary Committee that his office did not oppose the addition of a 3 judge panel to consider applications, versus the single Chief Court Administrator. See Testimony, Austin McGuigan, Chief State's Attorney, March 25, 1985 before the Judiciary Committee. With regard to the same amendment, Representative Shays noted, "The protection from abuse is that panel of three judges who will have to give permission before you impanel a one man grand jury. If the three member panel does not agree, you do not have a one man grand jury." See Rep. Shays remarks, House of Representatives, May 15, 1985.

Under 488, the state's attorney (applicant), merely has to apply to the presiding criminal judge in the same judicial district where the crime is "reasonably suspected" to have been committed, for an investigation into the commission of crimes. This is problematic because there would be less oversight and scrutiny of the application, since only one judge will be considering it rather than three. The single judge considering the application will most likely be considering the application of the state's attorney for the judicial district where that judge presides. Practically speaking, it may be more difficult for a judge to deny an application where it is a close call since he/she works with the applicant on a regular basis. There does not appear to be a rational reason for removing the three judge panel and the heightened standards for granting the application, other than

to give prosecutors carte blanche to collect witnesses, information, and documents without regard for the constitution or meaningful judicial oversight.

Who comprises the investigatory grand jury?

Under the present state of the law, the investigatory grand jury is a judge, judge referee, or three-judge panel. C.G.S. 54-47b(3).

Raised Bill 488, section 1 limits the investigatory grand jury to a judge assigned by the presiding judge in the judicial district where the crime was allegedly committed. In other words, the presiding judge who determines whether to grant the application appoints a judge with whom he/she works on a daily basis to serve as the "investigatory grand jury." These proposals are a blatant attempt to render the investigatory grand jury obsolete. While we certainly do not presume that judges in this state cannot exercise independent and fair judgment, 488 sets up the grand jury process so that there are fewer impediments to granting applications and fewer participants in the process with very little power. It eliminates meaningful independence between the judge who determines whether to grant the investigation and the judge who is designated as the purported "investigatory" grand jury.

What does the investigatory grand jury do?

Under the current state of the law, the investigatory grand jury is actually charged with investigating; according to 54-47b(3), the investigatory grand jury is supposed to "conduct an investigation into the commission of crime or crimes." According to 54-57f, in the event that a prosecutor makes the application, the grand jury may seek assistance of the prosecutor who filed the application --- but is not required to do so. Or, where a judge filed the application, the grand jury may appoint an attorney to *provide assistance* in the investigation, or, whenever it is in the

interest of justice, appoint any attorney *to assist*. The investigatory grand jury, under the current state of the law, is truly an *investigatory* grand jury. If a prosecutor is involved, he/she is involved at the behest of the grand jury and for the purpose of *assisting* not *controlling* the process.

Raised bill 488, takes away the investigative power of the grand jury. It deletes all language in 54-47a through 54-47h stating that the grand jury conducts the investigation. Despite removing all language giving the grand jury the power to investigate, the drafters of 488 refer to the grand jury as "investigatory." Whether this is an oversight or intentional, it is a misleading title – the grand jury that exists if 488 is passed is certainly not an investigatory grand jury. It is a judge monitoring a prosecutor's investigation that is unfettered by constitutional bounds concomitant with a typical law enforcement investigation into crime.

The "investigatory" grand jury under 488 does not have any power to appoint an attorney to *assist* them in conducting the application. The amendment makes it only the applicant – a prosecutor - who is able to conduct the investigation. This runs contrary to the protective provisions built into the existing grand jury law. "The most important function of the grand jury is not only to examine into the commission of crimes . . . . but 'to stand between the prosecution and the accused...'" Hoffman v. United States, 341 U.S. 479 (1951), and to protect citizens from harassment and unfounded prosecution. See e.g., Wood v. Georgia, 370 U.S. 375, 390 (1962); Hoffman v. United States, 341 U.S. 479, 485 (1951); Ex parte Bain, 121 U.S. 1, 11 (1887). Raised Bill 488 takes away all power of the grand jury to provide any meaningful protection.

What is the Subpoena Power of the grand jury?

Under the current state of the law, the grand jury may subpoena people to testify before it and produce documents. If a summoned witness fails to comply, the grand jury may report this to the appropriate state's attorney or the chief state's attorney, who in turn may file a complaint in criminal court. After a show cause hearing, the court may punish the witness for contempt.

Under Raised Bill 488, it appears that any "official authorized to issue such process" may subpoena/compel the "appearance" of witnesses and the production of documents or other tangible evidence. The bill deletes the requirement that the compelled appearance of the witness and the production of documents be "at such investigation," apparently enabling the prosecutor to question witnesses and obtain documents outside of the presence of the "investigatory grand jury."

The "investigatory grand jury" must approve the subpoena. The grand jury may consider, but does not have to, whether the person to be summoned to appear and give testimony or produce documents has information relevant to the investigation. The subpoena power authorized by the bill and the dilution of standards and oversight provided by the grand jury render this section as dangerous as the "investigatory subpoena" bills that have been proposed and repeatedly rejected in recent years.

The fourth and fourteenth amendments to the United States constitution and article first, sections 7 and 8 of the Connecticut constitution, require that law enforcement officials obtain a warrant backed by probable cause before they may conduct a search and seizure. Raised Bill 488 circumvents this protection by giving the state's attorney the power to compel people to turn over whatever property the grand jury may, but does not have to, deem "relevant to the matter under investigation."

Raised Bill 488 does not reform Connecticut's investigatory grand jury process, it effectively eliminates it in favor of a standardless procedure that is predominantly controlled by the state's attorney, and that fails to afford meaningful protection to the citizens of Connecticut. Consequently, CCDLA respectfully opposes it. Please contact me if you have any questions regarding our position on this bill. Thank you.

Sincerely,

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